No. 126, Original

In The

Supreme Court of the United States

October Term, 1997

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

On Motion For Leave To File Bill Of Complaint

KANSAS' RESPONSE TO MOTION FOR LEAVE TO FILE SUR-REPLY

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STATEMENT

The Legislature of the State of Kansas gave final approval to House Concurrent Resolution No. 5030 on February 27, 1998, supporting the decision of the Attorney General of Kansas to file and prosecute an action against the State of Nebraska to enforce the Republican River Compact. As authorized by Supreme Court Rule 17.3, the State of Kansas, through its Attorney General, filed its Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support of Motion for Leave to File Bill of Complaint ("Kan. Brief") on May 26, 1998, with House Concurrent Resolution No. 5030 as Appendix A thereto.

As authorized by Supreme Court Rule 17.5, the Brief of the State of Nebraska and Request for Oral Argument in Opposition to Kansas' Motion for Leave to File Bill of Complaint ("Neb. Brief") was filed on July 24, 1988. As also authorized by Rule 17.5, Kansas' Reply to Nebraska's Brief in Opposition and to Nebraska's Request for Oral Argument was filed August 7, 1998 ("Kan. Reply"). Then, without authorization in the Supreme Court Rules, on August 20, 1998, Nebraska took the unusual step of filing a Motion for Leave to File Sur-Reply to Kansas' Reply to Nebraska's Brief in Opposition and Sur-Reply ("Neb. Sur-Reply"), necessitating this Response.

ARGUMENT

I. Nebraska's Motion is Procedurally Inappropriate.

Nebraska's Motion for Leave to File Sur-Reply is procedurally inappropriate for several reasons. First, the Supreme Court Rules do not authorize a sur-reply brief.

See Sup. Ct. R. 17. No further rounds of briefing should be allowed.

Second, the proposed Nebraska Sur-Reply simply repeats many of the Nebraska statements of position from the Nebraska Brief in Opposition. For example, Nebraska repeats its factual allegation that Kansas has received its full allocation of Republican River water every year except 1992 and that this allegation should suffice to bar Kansas from being allowed to prove its case. See Neb. Sur-Reply 1; *compare* Neb. Brief 5, 11. Kansas opposed this argument in its Reply Brief, Kan. Reply 2, 6-7, and reiteration by either party is unnecessary. The same is true of other statements in the proposed Sur-Reply.

Third, the Court does not favor sur-reply briefs. See, *e.g., Nebraska v. Wyoming*, 506 U.S. 938 (1992) (denial of Nebraska's motion for leave to file sur-reply brief on exceptions); *New Jersey v. New York*, 510 U.S. 805 (1993) (denial of defendant's motion to file sur-reply brief on motion for leave to file), 118 S.Ct. 27 (1997) (denial of defendant's motion to file sur-reply brief on exceptions).

II. Nebraska's Proposed Sur-Reply is Substantively Inadequate.

Nebraska's proposed Sur-Reply Brief is substantively inadequate for several reasons. First, Nebraska inappropriately asks the Court to accept its view of disputed fact issues as a basis for denying Kansas' Motion for Leave to File.[1] The existence of disputed fact issues is one

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[1] Nebraska's factual allegations that Kansas did not sufficiently raise certain subissues before the Republican River Compact Administration ("RRCA"), Neb. Sur-Reply 6, are both

of the primary reasons that the State of Kansas has requested the exercise of the Court's original jurisdiction. As the Court said in *Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), "A State cannot be its own ultimate judge in a controversy with a sister State." The Court then went on to say, "To determine the nature and scope of obligations as between States, is the function and duty of the Supreme Court of the Nation." *Ibid.* Nebraska, on the other hand, would have the Court defer to Nebraska's view of these disputed facts, in essence allowing Nebraska to be "its own ultimate judge" in this controversy. This would usurp the proper functioning of the Court with respect to interstate controversies.

A second reason that Nebraska's proposed Sur-Reply Brief is substantively inadequate is that it asks the Court to deny the Motion for Leave to File on the basis of Nebraska's unilateral interpretations of the Republican River Compact. This is a premature attempt by Nebraska to have the Court rule on important matters of Compact interpretation without the opportunity for Kansas fully to present its position. The Court considers interpretation of a compact to be a significant and appropriate function of the Court. See *Texas v. New Mexico*, 462 U.S. 554, 567-568 (1983) ("If there is a compact, it is a law of the United States, and our first and last order of business is interpreting the compact."). And the Court has traditionally insisted on full development of the record before making its determination of the nature and scope of

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inapt and wrong. See, *e.g.*, RRCA, 25th-37th Annual Reports (1985-1997).

obligations between sovereigns in the exercise of its original jurisdiction. See, *e.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950).

There are fundamental differences between the States over the interpretation of the Compact. These differences include (1) whether groundwater well pumping in the Republican Basin that affects the surface flows of the River is subject to the Compact, see, *e.g.*, Kansas Bill of Complaint ¶7, Neb. Brief 20, Neb. Sur-Reply 4 n.1; (2) the purpose and effect of Compact Administration actions and rules and regulations, see, *e.g.*, Neb. Brief 1, 5, Kan. Reply 5, 7, Neb. Sur-Reply 1-5; and (3) whether Kansas is required to take delivery of its allocation for irrigation purposes, such as the Kansas Bostwick Irrigation District, during the winter, as Nebraska suggests, see Kan. Brief 6, Neb. Brief 17, Kan. Reply 4, 6, Neb. Sur-Reply 2-3. The foregoing examples from the proposed Sur-Reply are not exhaustive, but they serve to illustrate that significant issues of Compact interpretation are disputed by the States, are not susceptible to resolution by the States, and need the authoritative determination of this Court.

A third reason that Nebraska's proposed Sur-Reply Brief is substantively inadequate is that it seeks to inject pleading sufficiency as an additional criterion for exercise of the Court's original jurisdiction. Nebraska, as it did in its Brief in Opposition, complains of alleged pleading deficiencies. *E.g.*, Neb. Sur-Reply 2 ("Kansas' Reply Contains New Claims Not Included in Kansas' Bill of Complaint."). Sufficiency of pleadings is not one of the criteria set out by the Court as the basis for deciding whether to exercise its original jurisdiction. See *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); Kan. Brief 11.

Therefore, the pleading arguments that Nebraska is making in this case are irrelevant.

The foregoing discussion of substantive inadequacies of the proposed Nebraska Sur-Reply Brief are meant to be illustrative only. An exhaustive discussion will be provided if required or allowed by the Court.

CONCLUSION

The Nebraska Motion for Leave to File Sur-Reply to Kansas' Reply to Nebraska's Brief in Opposition should be denied.

Respectfully submitted.

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